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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MATTHEW TYE, HARRY
SCHMOLL, MICHAEL WILCOX,
CRAIG LAMSTER and TANYA
THOMPSON MULLINS, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

WAL-MART STORES, INC., and
WAL-MART STORES EAST, L.P.,

Defendants.

Case No. 8:15-cv-01615-DOC-JCG

Date: April 25, 2016

Time: 8:30 a.m.

Courtroom: 9D

The Honorable David O. Carter

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
THE FIRST AMENDED CLASS ACTION COMPLAINT**

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1 **Introduction to the Action**

2 This is a proposed class action, brought on behalf of all those who purchased
3 Walmart's store-brand "**Great Value Pork & Beans in Tomato Sauce,**" ("the
4 Product") in a Walmart store located in the United States, between October 7, 2009
5 and the present. This action is also brought on behalf of five proposed state sub-
6 classes, each composed of all those who purchased the Product at a Walmart store
7 located in California, New Jersey, Pennsylvania, New York and Illinois, respectively,
8 between October 7, 2009 and the present. Each of the five named Plaintiffs resides in
9 one of these five states, and each Plaintiff purchased one or more containers of the
10 Product during the proposed class period at a Walmart store located in the state in
11 which that Plaintiff resides.

12 The Product is a Walmart store-brand food product which is distributed by
13 Defendants and is sold exclusively by Defendants at Walmart stores. Despite the
14 inclusion of the words "**Pork & Beans**" in the name of the Product itself, and despite
15 the fact that the "**INGREDIENTS**" section on the label on each and every container
16 of the product lists "**Pork**" as an ingredient of the product, rigorous scientific testing
17 has revealed that the Product actually contains no pork whatsoever. Thus, each and
18 every can of the Product bears a uniformly-worded label which makes the same false,
19 affirmative statements of fact: that pork is included in the Product. Defendants have
20 been fully aware that the Product actually contains no pork at all since its inception.

1 The complaint seeks injunctive, declaratory and monetary relief for Plaintiffs,
2 the five proposed State Sub-Classes and the Nationwide Class, as outlined in greater
3 detail in the First Amended Complaint ("FAC"). The claims pleaded include two
4 claims on behalf of Plaintiffs and the proposed Nationwide Class: Count I (breach of
5 warranty) and Count II (unjust enrichment). The remainder of the twenty-two counts
6 pleaded are brought on behalf of the various named Plaintiffs and the proposed state
7 sub-class that particular named Plaintiff seeks to represent, and include state law
8 claims applicable to purchases in the state where the particular Plaintiff and state sub-
9 class members reside.

13 Summary of Argument

14 Defendants' motion to dismiss consists of three elements: 1) ignoring and/or
15 denying the facts actually pleaded in the complaint; 2) demanding a level of "hyper-
16 specificity" that neither Twombly – nor any other authority – requires to successfully
17 state a claim at the pleading stage; and 3) making a preemptive attack on the
18 Fed.R.Civ.P. 23 issues in this matter, at a time before any class certification motion
19 has been filed and when there has been no briefing or discovery relating to class
20 certification issues.

21 For the reasons spelled out in detail in the subsequent sections of this
22 memorandum, Defendants' arguments in favor of their Fed.R.Civ.P. 12(b)(6) motion
23 are without merit. Plaintiffs' FAC is forty-seven pages long and contains far more
24 factual detail than is required by either Fed.R.Civ.P. 8 or 9. Accepting the facts

1 actually pleaded in the FAC as true on this motion, as is required on a motion brought
2 under Fed.R.Civ.P. 12(b)(6), it is abundantly clear that the FAC meets all
3 requirements to state viable claims against Defendants. As for Defendants' premature
4 arguments regarding class certification, this is not the appropriate stage to resolve
5 such Fed.R.Civ.P. 23 issues. Whether or not a class will eventually be certified, who
6 will be in that class or classes, and whether a proposed named plaintiff can represent
7 such a class, are all issues that will be decided on a motion for class certification, after
8 class discovery and briefing of the class issues.

11 To borrow the wording of post-Twombly cases, Plaintiffs' complaint
12 "presents a story that holds together" and puts Defendants on notice of the precise
13 claims asserted against them. If the Court disagrees, Plaintiffs will be happy to amend
14 their pleading to provide any additional factual details which the Court deems to be
15 appropriate. Plaintiffs submit, however, that the FAC meets federal pleading
16 requirements and that Defendants' motion to dismiss should be denied in its entirety.

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20 **I. DEFENDANTS' ARGUMENT THAT PLAINTIFFS MUST PLEAD**
21 **GREATER DETAIL REGARDING THE SPECIFIC TESTING**
22 **CONDUCTED BY PLAINTIFFS' EXPERT IS BOTH CONTRARY TO**
23 **LAW AND IGNORES THE DETAILED FACTUAL ALLEGATIONS**
24 **ALREADY CONTAINED IN THE COMPLAINT**

25 The first argument advanced by Defendants is the erroneous contention that
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1 Plaintiffs' complaint should be dismissed with prejudice¹ because the complaint does
 2 not plead in detail the specific testing utilized by Plaintiffs' experts to determine that
 3 Defendants' product contains no pork whatsoever. In making this argument,
 4 Defendants are attempting to stretch the holding of Bell Atlantic v. Twombly, 550
 5 U.S. 544 (2007) and Fed.R.Civ.P. 9² well beyond their breaking point. Indeed,
 6 Defendants essentially argue that, in order to survive a motion to dismiss under
 7 Fed.R.Civ.P. 12(b)(6), Plaintiffs must actually prove the factual allegations of the
 8 complaint by either 1) attaching an expert report from the testing lab utilized by
 9 Plaintiffs or 2) by paraphrasing the contents of such an expert report in the complaint.
 10 Defendants' demand for "hyper-specificity" as to testing done by Plaintiffs' experts
 11 is contrary to law and goes far beyond what is required at the pleading stage.
 12 Moreover, contrary to the premise of Defendants' argument, the FAC does plead –
 13 not only the facts on which Plaintiffs' claims are based – but also specific information
 14 regarding the testing which supports those alleged facts, in far greater detail than what
 15 is required by the federal rules. According, Defendants' argument is without merit.

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 23 ¹ Defendants' request for dismissal with prejudice is contrary to law. If the Court disagrees with Plaintiffs and believes
 24 that greater detail is required in the complaint, Plaintiffs will amend their pleading to provide any additional factual
 25 information the Court deems to be appropriate. Defendants' assertion that Plaintiffs should not be given such an
 26 opportunity to cure any defects found by the Court conflicts with black letter law. See Manzarek v. St. Paul Fire &
Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008) ("Dismissal without leave to amend is improper unless it is
 27 clear, upon de novo review, that the complaint could not be saved by any amendment."); Farias v. AMTRAK, No.
 28 SA CV 15-0633 DOC (AJWx) 2015 U.S. Dist. LEXIS 105488, at *6 (C.D. Cal. Aug. 11, 2015)(Judge Carter)
 ("Dismissal without leave to amend is appropriate only when the court is satisfied that the deficiencies in the
 complaint could not possibly be cured by amendment.")

² As outlined in greater detail in Section III, *infra*, Fed.R.Civ.P. 9 does not even apply to many of the claims pleaded,
 including the breach of warranty claims, breach of contracts claims, and unjust enrichment claims pleaded in the
 complaint. See First Amended Complaint at Counts I, II, IX, XI, XII, XV, XVI, XIX, XXI and XXII.

1 **A. Defendants Misconstrue Federal Pleading Requirements**

2 Contrary to the impression created by Defendants' motion, the United States
 3 Supreme Court in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) expressly
 4 declined to impose a "heightened" pleading standard in federal court. See Twombly,
 5 550 U.S. at 569, n.14. In Twombly, the Supreme Court explained that to survive a
 6 motion to dismiss under Rule 12(b)(6), a complaint **"does not need detailed factual**
 7 **allegations,"** and that a plaintiff's obligation is only to provide **"sufficient factual**
 8 **allegations 'to raise a right to relief above the speculative level.'"** Twombly, 550
 9 U.S. at 555. As reiterated by the United States Supreme Court in Erickson v. Pardus,
 10 551 U.S. 89, 93 (2007):

11 **"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain**
 12 **statement of the claim showing that the pleader is entitled to relief.' Specific**
 13 **facts are not necessary; the statement need only 'give the defendant fair notice**
 14 **of what the ... claim is and the grounds upon which it rests.'"** (emphasis added)

15 Nothing in Twombly or its progeny requires Plaintiffs' complaint to plead
 16 exactly what scientific tests were performed by Plaintiffs' experts on Defendants'
 17 product, let alone to do so in the excruciating detail demanded in Defendants' motion.
 18 See e.g. Bertrand v. Eli Lilly & Co., No. 12-0853, 2013 U.S. Dist. LEXIS 114386, at
 19 *21 (W.D. La. Mar. 13, 2013), which applied Fifth Circuit precedent – which takes a
 20 far more restrictive approach than has been taken by the Ninth Circuit – to
 21 conclusively reject an argument that Twombly and Iqbal required a complaint in a
 22 defective drug case to plead the specific scientific tests used to prove the defect,
 23 stating:

1 “Counsel went on to argue that the only way that could be done in a
 2 pharmaceutical case was for the plaintiff to cite specific medical/scientific tests
 3 which showed the defect. In other words, defendant argues that the plaintiff
 4 must come forward with a summary judgment type evidence at the initial
 5 pleading stage. The practical effect of such a requirement would be to essentially
 6 preclude pharmaceutical cases under the LPLA in federal court because of
Iqbal and Twombly. Neither Iqbal, Twombly nor Rule 8 require such specificity
at the initial pleading stage. In fact, Iqbal, Twombly and Lormand make it clear
that a much less strict standard, that of mere plausibility, is all that is required
at the pleading stage.” (emphasis added)

7 See also Waldo v. Eli Lilly & Co., 2013 U.S. Dist. LEXIS 145772, at *17-18 (E.D.
 8 Cal. Oct. 7, 2013), rejecting an argument that Twombly required a plaintiff to plead
 9 what specific tests defendant should have performed, noting:

11 “Contrary to Eli Lilly’s assertions, these are not conclusory allegations of the
 12 type forbidden by Iqbal and Twombly. At the pleadings stage, Waldo need not,
 13 e.g., detail with specificity what tests Eli Lilly should have undertaken or what
 14 information it should have provided physicians regarding product risks.”
 (emphasis added)

15 See also McGarry v. Pallito, Civil Action No. 1:09-CV-128, 2013 U.S. Dist. LEXIS
 16 93715, at *22 n.8 (D. Vt. May 22, 2013) (rejecting the argument that the complaint
 17 failed to satisfy Twombly because it did not describe the expert medical evidence
 18 which linked plaintiff’s disease to his working conditions, stating **“There is no need**
 19 **for medical expert testimony at the pleading stage.”**)

21 Defendants’ argument that Plaintiffs’ complaint must plead the specific tests
 22 undertaken by Plaintiffs’ experts represents a wholesale assault on the basic pleading
 23 requirements of Fed.R.Civ.P. 8 and 9. These pleading rules require the complaint to
 24 plead only the facts, not the evidence which will be used to prove those facts at trial.

25 See United States ex rel. Grubbs v. Ravikumar Kanneganti, 565 F.3d 180, 190 (5th
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1 Cir. 2009) (rejecting an argument that a plaintiff must plead evidence of false claims
 2 because, “[t]o require these details at pleading is one small step shy of requiring
 3 production of actual documentation with the complaint, a level of proof not
 4 demanded to win at trial and significantly more than any federal pleading rule
 5 contemplates”); Kurtzman v. Compaq Computer Corp., 2000 U.S. Dist. LEXIS
 6 22476, *71 (S.D. Tex. Dec. 12, 2000) (“**Rule 9(b) does not require pleading of**
 7 **evidence**”); Chapdelaine Corporate Sec. & Co. v. Depository Trust & Clearing Corp.,
 8 2006 U.S. Dist. LEXIS 49273, *8, 2006-2 Trade Cas. (CCH) P75, 361 (S.D.N.Y. July
 9 13, 2006) (“**To comply with Rule 8, a party need not plead evidence.**”).
 10 Demanding that Plaintiffs plead the particular tests conducted by Plaintiffs’ experts
 11 goes well beyond what is required at the pleading stage.

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 16 **B. Plaintiffs’ Complaint Alleges Sufficient Facts to Raise a Facially**
 17 **Plausible Claim that Defendants’ Product Contains No Pork**

18 A complaint need not plead every fact known to a plaintiff. Rather, a complaint
 19 need only plead enough facts to make the claim facially plausible. See Yuckming
 20 Chiu v. Citrix Sys., No. SA CV 11-1121 DOC (RNBx), 2011 U.S. Dist. LEXIS
 21 151365, at *7 (C.D. Cal. Nov. 23, 2011)(Judge Carter) (“**Under Iqbal, the pleading**
 22 **need only allege sufficient facts such that the court can be informed that the**
 23 **plaintiff possesses a ‘claim to relief that is plausible on its face.’”) In the case at**
 24 **bar, Plaintiffs’ complaint clearly meets that standard.**

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 27 First and foremost, with regard to the pork content of Defendants’ product, the
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1 FAC pleads as a factual matter that Defendants' product contains no pork whatsoever.

2 See FAC at Paragraphs 4, 6, 57-58. Plaintiffs' complaint makes clear that the factual
3 allegation that the Product contains no pork is not a guess or mere speculation, but
4 rather that it is based on **"rigorous scientific testing, including microscopic and
5 chemical analysis [which] has revealed that the Product contains no pork
6 whatsoever."** FAC at Paragraph 57. It is submitted that these factual allegations, by
7 themselves, are enough to nudge Plaintiff's complaint beyond the level of mere
8 speculation and to give rise to a plausible claim that the Product contains no pork.
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11 Plaintiffs' complaint, however, does not stop there. In fact, contrary to the
12 premise on which Defendants' flawed argument is built, Plaintiffs' complaint goes on
13 to allege with specificity the source of the protocols and methods used for the testing
14 conducted by Plaintiffs' expert and also names at least one of the multiple scientific
15 tests to which Plaintiffs' experts subjected Defendant's Product. See FAC at
16 Paragraph 58:
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20 **"58.The testing upon which Plaintiffs rely was conducted in accordance with
21 FDA Protocols and the Official Methods of the Association of Official Analytical
22 Chemists International (AOAC), including the 12-sample method set forth in 21
23 C.F.R. § 101.9(g)(2). Plaintiffs do not believe that such testing was necessary or
24 required in this case, but they have nevertheless complied with these protocols
25 out of an abundance of caution."**

26 Defendants' motion refuses to accept these allegations as true, arguing that their
27 motion under Fed.R.Civ.P. 12(b)(6) should be granted because, inter alia, Defendants
28 deny the allegation that the Product contains no pork whatsoever. It is impermissible
for Defendants to seek dismissal under Fed.R.Civ.P. 12(b)(6), simply because

1 Defendants deny or dispute the facts alleged in the complaint. See e.g. Perea v.
 2 Walgreen Co., 939 F. Supp. 2d 1026, 1031 (C.D. Cal. 2013)(Judge Carter) (“**On a**
 3 **motion to dismiss, the court accepts as true a plaintiff’s well-pled factual**
 4 **allegations and construes all factual inferences in the light most favorable to the**
 5 **plaintiff.”). It is especially inappropriate for the Defendants to seek to rely upon**
 6 **extraneous materials not included or attached to the complaint in their Fed.R.Civ.P.**
 7 **12(b)(6) motion, such as the alleged “recipe”³ which Defendants contend the non-**
 8 **party manufacturer of Defendants’ Product used, or was allegedly told to use, in**
 9 **making the Product. See Black v. Ritz-Carlton Hotel Co., LLC, 977 F. Supp. 2d 996,**
 10 **1010 (C.D. Cal. 2013)(Judge Carter) (“In evaluating a Rule 12(b)(6) motion,**
 11 **review is ordinarily limited to the contents of the complaint and material**
 12 **properly submitted with the complaint.”)**

13 Defendants also contend that the 12 sample testing protocol described in
 14 Paragraph 58 of the FAC is the “wrong” test to determine pork content.⁴ Defendants
 15 are mistaken. 21 C.F.R. 101.9(g)(2) provides that **“The sample for nutrient analysis**
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17 ³ Defendants’ attempt to use this alleged “recipe” to support a motion to dismiss is misplaced and should be
 18 rejected. Moreover, this alleged recipe is clearly not evidence of what is actually in the product, any more
 19 than the false statements on the product label itself – with also states that the product contains “pork” – is
 20 such evidence. At most, the recipe may be evidence of what should have been in the product, or what
 21 someone may have told someone else to put in the product. Plaintiffs’ claims are based on what the scientific
 22 testing conducted by Plaintiffs’ experts found is actually in the product; in contrast to what Defendants say
 23 is, or should be, in the product.

24 ⁴ Defendants also ignore the fact, stated with clarity in Paragraphs 57 and 58, that the 21 C.F.R. § 101.9(g)(2)
 25 12 sample method testing protocol described was only one of several tests conducted, all of which – as alleged
 26 – were conducted “**in accordance with FDA Protocols and the Official Methods of the Association of**
 27 **Official Analytical Chemists International (AOAC)...**” To the extent that Defendants want to know more
 28 about the testing done by Plaintiffs’ experts, that is the purpose of expert discovery.

1 shall consist of a composite of 12 subsamples (consumer units), taken 1 from each
2 of 12 different randomly chosen shipping cases, to be representative of a lot.” 21
3
4 C.F.R. 101.9(g)(2) goes on to provide that “Unless a particular method of analysis
5 is specified in paragraph (c) of this section, composites shall be analyzed by
6 appropriate methods as given in the ‘Official Methods of Analysis of the AOAC
7 International,’ 15th Ed. (1990), which is incorporated by reference in accordance
8 with 5 U.S.C. 552(a) or 1 CFR part 51 or, if no AOAC method is available or
9 appropriate, by other reliable and appropriate analytical procedures.”
10
11 (emphasis added) 21 C.F.R. 101.9(c) does not provide a specific method of testing
12 for “pork.” Thus, the plain language of 21 C.F.R. 101.9(g)(2) authorizes the use of
13 the 12 sample testing method, tested according to “**appropriate methods as given in**
14 **the ‘Official Methods of Analysis of the AOAC International’... [and] if no**
15 **AOAC method is available or appropriate, by other reliable and appropriate**
16 **analytical procedures.”** As noted above, the FAC specifically pleads that Plaintiffs’
17 experts tested the yogurt using the 12 sample protocol and conducted tests according
18 to AOAC protocols and methods, as authorized by 21 C.F.R. 101.9(g)(2). See FAC
19 at Paragraph 58.

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23
24 More importantly, Defendants’ arguments misperceive the standard on a
25 motion to dismiss under the federal rules. During the course of this litigation,
26 Defendants are obviously free to dispute the facts alleged in the complaint, or to
27 challenge the testing methodology used by Plaintiffs’ experts. But the current motion
28

1 is simply not the forum for deciding such disputed issues of fact. Nor is a motion to
2 dismiss the proper place to ask the Court to settle disputes as to which scientific tests
3 are, or are not, reliable and how much weight to accord various tests and expert
4 opinions. Any such disputes will be settled at either summary judgment or trial, after
5 the opportunity for discovery; including the exchange of expert reports and the
6 opportunity to depose each party's experts. At the pleading stage, Plaintiffs have more
7 than adequately pleaded the fact that the Product contains no pork whatsoever and the
8 complaint provides a more than adequate factual basis for the plausibility of that
9 allegation.
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12

13 **II. PLAINTIFFS' COMPLAINT PLEADS FACTS WHICH ARE NOT**
14 **"MERELY CONSISTENT" WITH LIABILITY, BUT RATHER**
15 **PLEADS FACTS WHICH CLEARLY STATE A PLAUSIBLE CLAIM**
16 **FOR LIABILITY**

17 Defendants' argument that Plaintiffs' complaint plead facts which are "merely
18 consistent" with liability is without merit. Like most of Defendants' argument, that
19 argument is based on a series of straw man arguments that simply ignore or deny the
20 factual allegations actually pleaded in the FAC. Plaintiff's allegations do not leave
21 open any gap between "possibility" and "plausibility." Rather, the FAC pleads facts
22 which, if accepted as true – as they must be on a motion under Fed.R.Civ.P. 12(b)(6)
23 – conclusively establish that Defendants are liable for, inter alia, misrepresentation,
24 consumer fraud and the other claims pleaded.
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1 It is undisputed that the Product is named **“Pork and Beans.”** See FAC at
2 Paragraphs 4 and 55, as well as Figure 1 to Paragraph 55. It is undisputed that the
3 label on the Product states that the Product contains at least some pork. See FAC at
4 Paragraphs 4 and 56, as well as Figure 2 to Paragraph 56. Those undisputed facts,
5 coupled with the factual allegation that **“the Product contains no pork whatsoever”**
6 (FAC at Paragraph 57) and the allegation that Defendants were aware of this fact
7 (FAC at 59), makes out a rather obvious viable claim for, inter alia, intentional
8 misrepresentation.
9

10
11 Indeed, Plaintiffs’ complaint is built on the basic, common sense proposition
12 that it is misleading to the average consumer for Defendants to tell consumers that a
13 Product which has the word **“Pork”** in its name – and which lists **“pork”** as an
14 ingredient on the label – when the Product actually contains no pork whatsoever. Put
15 more simply, the facts pleaded – accepted as true at this juncture – amply establish,
16 not merely that Defendants *may* be liable, but that they *are* liable for misrepresenting
17 what is in the Product.
18
19

20
21 The other arguments raised by Defendants are similarly without merit.
22 Defendants’ argument that the ingredient list on the Product **“clarifies”** that the
23 Product **“contains ‘less than 2% of ... pork’”** tries to force a round peg into a square
24 whole. It is an attempt which completely ignores both the facts pleaded in the FAC
25 and the law. Contrary to the erroneous impression which Defendants’ argument seeks
26 to create, Plaintiffs do not allege that the Product fails to contain **“enough”** pork.
27
28

1 Rather, the gravamen of Plaintiffs' factual allegation is that **"the Product contains**
 2 **no pork whatsoever."** FAC at Paragraph 57.

3
 4 Similarly, Defendants make a failed attempt to invoke the FDA's CPG Sec.
 5 567.200 labeling guidance in their favor, by quoting the FDA's determination **"that**
 6 **the designation 'Beans with Pork or 'Pork and Beans' is the common or usual**
 7 **name for an article of commerce that contains very little pork."** Defendants'
 8 Memo at 17-18. Once again, Defendants are trying to defend by saying that the
 9 Product is not required to contain a great deal of pork. But the FAC does not allege
 10 that the Product contains only a small amount of pork. Rather, the complaint alleges
 11 that **"the Product contains no pork whatsoever."** FAC at Paragraph 57. As
 12 Defendants' own filing establishes, the FDA has stated that, while a pork and bean
 13 product does not need to contain a great deal of pork, it must still be made **"with**
 14 **pork."** In other words, a product which contains no pork whatsoever cannot comply
 15 with the FDA's CPG Sec. 567.200.

16
 17 Thus, the FAC goes well beyond alleging facts which are "merely consistent"
 18 with liability, or which "suggest" liability. If the facts pleaded in the FAC are accepted
 19 as true, then Defendants are liable on the claims pleaded.

20 21 22 23 **III. PLAINTIFFS HAVE MET THE REQUIREMENTS OF FED.R.CIV.P. 9** **FOR THOSE COUNTS WHICH ARE FRAUD-BASED**

24
 25 Defendants' argument as to Fed.R.Civ.P. 9 is without merit. First, Fed.R.Civ.P.
 26 9 does not even apply to many of the claims pleaded in the FAC. These include the
 27
 28

1 various breach of warranty claims (Counts I, IX, XI, XV, XIX, and XXI), breach of
 2 implied contract claims (Counts XII, XVI, XXII) and the claim of unjust enrichment
 3 (Count II). None of these claims include fraud as a required element and they are
 4 subject to Fed.R.Civ.P. 8 standards, not Fed.R.Civ.P. 9. Second, even as to those
 5 claims to which Fed.R.Civ.P. 9 does apply, the FAC contains facts which amply meet
 6 the rule's requirements.
 7
 8

9 In order to satisfy Fed.R.Civ.P. 9, the complaint must set forth the required
 10 **"who, what, when, where, and how"** of the fraud alleged. Cooper v. Pickett, 137
 11 F.3d 616, 627 (9th Cir. 1997). See also Petersen v. Allstate Indem. Co., 281 F.R.D.
 12 431, 419 (C.D. Cal. 2012) (**"Plaintiff has pled what the fraud was, how it was
 13 accomplished, and why the Defendant's statements are false"**). In the case at bar,
 14 Plaintiffs' FAC meets this standard by a wide margin.
 15
 16

17 The FAC pleads not only the exact wording of the allegedly false statements,
 18 the FAC also includes photographs of the actual Product label itself, which contains
 19 pictures of those false written statements. See e.g. FAC at Paragraph 55:
 20

21 **"Since the initial offering of the Product, each and every label on this Product**
 22 **has borne a uniformly-worded label which identifies the name of the Product in**
 23 **large letters as 'Great Value Pork & Beans in Tomato Sauce,' as depicted in**
Figure 1, below." (emphasis added)

24 See also Paragraph 56:

25 **"Since the initial offering of the Product, each and every label on this Product**
 26 **has borne a uniformly-worded label which includes, inter alia, the word 'PORK'**
 27 **under the word 'INGREDIENTS,' as depicted in Figure 2, below." (emphasis**
 28 **added)**

1 The FAC explains exactly how and why those statements by Defendants' were
 2 false. See e.g. Paragraphs 57-58:

3
 4 **"57. In actuality, rigorous scientific testing, including microscopic and chemical analysis, has revealed that the Product contains no pork whatsoever.**

5
 6 **58. The testing upon which Plaintiffs rely was conducted in accordance with FDA Protocols and the Official Methods of the Association of Official Analytical Chemists International (AOAC), including the 12-sample method set forth in 21 C.F.R. § 101.9(g)(2). Plaintiffs do not believe that such testing was necessary or required in this case, but they have nevertheless complied with these protocols out of an abundance of caution."** (emphasis added)

7
 8
 9 See also FAC at Paragraph 4:

10
 11 **"Despite the inclusion of the words 'Pork & Beans' in the name of the Product itself, and despite the fact that the 'INGREDIENTS' section on the label on each and every container of the product lists 'Pork' as an ingredient of the product, rigorous scientific testing has revealed that the Product actually contains no pork whatsoever."**

12
 13
 14 The FAC also pleads the dates when each Plaintiff purchased the Product and
 15 the address of the specific Walmart store – and the store number – where each Plaintiff
 16 purchased the Product. Indeed, for those Plaintiffs who kept their receipts, the
 17 complaint even includes – as an attachment – the receipts memorializing that
 18 Plaintiff's purchase. See e.g. FAC at Paragraph 14:

19
 20
 21 **"Specifically, Plaintiff Schmoll purchased the Product at Walmart Store #5340 located in Cherry Hill, New Jersey, on various dates between October 7, 2009 and the present, including on August 30, 2015, when Plaintiff Schmoll purchased three cans of the product at this location. See Attachment B, Receipt dated August 30, 2015."**

22
 23
 24 The FAC also pleads the exact role of Defendants in the alleged misconduct,
 25 including documentary evidence from the Product label itself which established that
 26 role. See e.g. FAC at Paragraph 24: **"The uniformly-worded label on the product**

1 admits, inter alia, that the product was ‘DISTRIBUTED BY: Wal-Mart Stores,
2 Inc.’” See also FAC at Paragraph 26:

3 “Together, Defendants Wal-Mart Stores, Inc. and Wal-Mart Stores East, L.P.
4 (collectively ‘Walmart’) jointly distributed, advertised, labeled, sold and/or
5 manufactured the product in, inter alia, California, New Jersey, Pennsylvania,
6 New York and Illinois, with each defendant jointly determining that each such
7 container of the product would bear the name ‘Great Value Pork & Beans in
8 Tomato Sauce’ and would list ‘PORK’ under the portion of the product label
9 marked ‘INGREDIENTS.’”

10 Accordingly, Defendants clearly understand the exact nature of the accusations
11 against them and the alleged fraud is pleaded with more than enough specificity to
12 meet the demands of Fed.R.Civ.P. 9.

13 **IV. COUNTS I AND II PROPERLY STATE CLAIMS FOR BREACH OF 14 WARRANTY AND UNJUST ENRICHMENT**

15 In Counts I and II of the FAC, Plaintiffs bring claims on behalf of both
16 themselves and a proposed nationwide class for breach of warranty and unjust
17 enrichment. Defendants argue that Counts I and II should be dismissed under Rule
18 12(b)(6). See Defendants’ Memo at 11. Defendants’ arguments in support of
19 dismissal of these counts under Fed.R.Civ.P. 12(b)(6) are erroneous.

20 Defendants concede that Fed.R.Civ.P. 9(b) does not apply to Counts I and II.
21 See Defendants’ Memo at 10. Thus, Plaintiffs need only meet the requirements of
22 Fed.R.Civ.P. 8 with regard to Counts I and II. Plaintiffs have clearly done so. Indeed,
23 the facts that support Counts I and II are the same facts which support Plaintiffs’ other
24 breach of warranty and unjust enrichment claims in Counts IX, XI, XV, XIX, XXI;
25
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1 claims which Defendants admit set forth valid claims and which Defendants concede
2 Plaintiffs have standing to bring. See Defendants' Memo at 12.

3
4 Defendants contend, however, that the breach of warranty and unjust
5 enrichment claims in Counts I and II somehow stand on a different footing because
6 they are pleaded on behalf of a nationwide – rather than a state-wide – class. Simply
7 put, Defendants are not arguing that Plaintiffs have failed to properly plead a viable
8 claim of breach of warranty or unjust enrichment. Rather, what Defendants are
9 seeking to dispute on this Fed.R.Civ.P. 12(b)(6) motion is whether Plaintiffs can bring
10 such claims on behalf of a nationwide class.
11

12
13 Such an argument, however, has nothing to do with Fed.R.Civ.P. 8 or 12.
14 Defendants are making an improper preemptive attack on class certification,
15 disguised as part of a motion to dismiss. As outlined by Plaintiffs in Section V, infra,
16 clearly established Ninth Circuit law holds that such a preemptive attack on class
17 certification issues is premature. Indeed, in one of the very cases cited by Defendants,
18 Pitre v. Yamaha Motor Co., Civil Action No. 13-5327 Section “G”(1), 2014 U.S. Dist.
19 LEXIS 138635 (E.D. La. Sept. 30, 2014), the court rejected an argument very similar
20 to one being raised on this motion by Defendants in the case at bar. There, as here,
21 the defendant moved to dismiss a claim pleaded on behalf of a proposed nation-wide
22 class, arguing that the named plaintiff had standing only to bring a claim under the
23 law of their home state. The court in Pitre refused to dismiss the nationwide claim at
24 the pleading stage, holding that as long as the named Louisiana plaintiffs had standing
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1 to bring a claim under Louisiana law, it would be premature for the court to dismiss
 2 the nationwide class claims on a motion to dismiss. See Pitre, at *62-63, where the
 3 court stated:
 4

5 **“the parties have not briefed the Court on the issue of class certification, and**
 6 **the Court will not speculate about the relationship between Plaintiffs’ surviving**
 7 **claims and the applicability of Federal Rule of Civil Procedure 23 absent further**
 8 **discovery and briefing on the issue.”**

9 The same analysis applies in the case at bar. At a minimum – as Defendants
 10 concede – Plaintiffs have pleaded viable claims for unjust enrichment and breach of
 11 warranty on behalf of themselves. Whether the Plaintiffs can also represent a
 12 nationwide class on claims of unjust enrichment and breach of warranty will be
 13 determined by the Court later. Currently, however, Counts I and II state perfectly
 14 viable claims for breach of warranty and unjust enrichment on behalf of the Plaintiffs
 15 themselves and that is enough to survive a motion to dismiss.
 16

17 **V. DEFENDANTS’ REQUEST TO DISMISS THE NATIONWIDE CLASS**
 18 **ALLEGATIONS ON A FED.R.CIV.P. 12(b)(6) MOTION IS**
 19 **PREMATURE**

20 It is well-established that the place to decide whether a class will be certified is
 21 on a class certification motion under Fed.R.Civ.P. 23, after the opportunity for class
 22 discovery and after full briefing of the class issues. See Vinole v. Countrywide Home
 23 Loans, Inc., 571 F.3d 935, 942 (9th Cir. 2009) (“**the pleadings alone will not resolve**
 24 **the question of class certification,**” and therefore “**the better and more advisable**
 25 **practice for a District Court to follow is to afford the litigants an opportunity to**
 26 **present evidence as to whether a class action [is] maintainable.”**); Pitts v.
 27
 28

1 Terrible Herbst, Inc., 653 F.3d 1081, 1094 n.5 (9th Cir. 2011) (it is an abuse of
 2 discretion to dismiss class action if “**propriety of a class action cannot be**
 3 **determined . . . without discovery**”) (citations omitted).
 4

5 Despite this, Defendants in the case at bar have opted to make a preemptive
 6 strike on the class allegations of the FAC as part of a motion to dismiss; a tactic which
 7 has been repeatedly rejected as premature. See Yuckming Chiu v. Citrix Sys., No. SA
 8 CV 11-1121 DOC (RNBx), 2011 U.S. Dist. LEXIS 151365, at *6 (C.D. Cal. Nov. 23,
 9 2011)(Judge Carter), denying motion to strike class action allegations as premature,
 10 stating:
 11

12
 13 “As an initial matter, Defendant argues that Plaintiff’s allegations fall short of
 14 alleging the requirements to assert a class action. Mot. at 2. The Court does not
 15 address this issue because it would be better addressed through a fully-briefed
 16 class certification hearing than on this motion to dismiss and it is not plain from
 the face of the complaint that Plaintiff’s class action allegations fail.” (emphasis
 added)

17 See also Whitson v. Bumbo, Ltd., No. C 07-05597 MHP, 2008 U.S. Dist. LEXIS
 18 39062, at *2 (N.D. Cal. May 8, 2008), denying motion to dismiss nationwide class
 19 allegations as premature, stating:
 20

21 “While state to state variations in the law raise questions as to whether a nation-
 22 wide class action is manageable for purposes of class certification, the variations
 23 do not imply that plaintiff has failed to state a claim under those laws. Defendant’s concerns, therefore, are raised prematurely in the present Rule
 24 12(b)(6) motion to dismiss. They will be more timely and appropriately
 25 addressed at a later date if and when plaintiff moves for class certification.”
 (emphasis added)

26 The cases upon which Defendants rely are inapposite. In each of Defendants’
 27 cases, the court dismissed nationwide statutory consumer protection law claims. See
 28

1 Pardini v. Unilever United States, Inc., 961 F. Supp. 2d 1048, 1061 (N.D. Cal. 2013)
 2 (dismissing without prejudice claims under the consumer protection laws of all fifty
 3 states where there was only one named plaintiff, who did not allege that she had
 4 purchased the product at issue in all fifty states, as required by state consumer
 5 protection laws); Granfield v. NVIDIA Corp., C-11-05403 JW, 2012 U.S. Dist.
 6 LEXIS 98678, *10 (N.D. Cal. July 11, 2012) (same); Morales v. Unilever U.S., Inc.,
 7 No. 2:13-2213, 2014 U.S. Dist. LEXIS 49336, *18-19 (E.D. Cal. April 9, 2014)
 8 (same). In the case at bar, the only claims pleaded on behalf of the proposed
 9 nationwide class are found in Count I and Count II, which plead breach of warranty
 10 and unjust enrichment claims, not state statutory claims.

11
 12 Defendants are free to argue that no nationwide class should be certified, when
 13 Plaintiffs actually make a class certification motion and after the parties brief such a
 14 motion. The issue on a motion under Fed.R.Civ.P. 12 is whether Plaintiffs have stated
 15 a viable claim on behalf of themselves, which they clearly have.

16 **VI. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED BY FEDERAL LAW**

17 **A. Defendants Must Overcome a Presumption Against Preemption**

18 Courts recognize a strong presumption against preemption that may be
 19 overcome only by “**clear and manifest**” congressional intent to the contrary.
 20 Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). As stated in Wyeth v. Levine, 555
 21 U.S. 555, 565 (2009) “**we start with the assumption that the historic police powers**
 22 **of the States were not to be superseded by the Federal Act unless that was the**”

1 **clear and manifest purpose of Congress.”** A party seeking preemption of state law
 2 thus bears a heavy burden, for **“preemption of state law by federal statute or**
 3 **regulation is not favored ‘in the absence of persuasive reasons – either that the**
 4 **nature of the regulated subject matter permits no other conclusion, or that**
 5 **Congress has unmistakably so ordained.”** Chicago & N.W. Transp. Co. v. Kalo
 6 Brick & Tile Co., 450 U.S. 311, 317 (1981) (citation omitted). This approach
 7 **“provides assurance that the ‘federal-state balance’ will not be disturbed**
 8 **unintentionally by Congress or unnecessarily by the courts.”** Jones v. Rath
 9 Packing Co., 430 U.S. 519, 525 (1977) (citation omitted). **“The presumption**
 10 **against preemption has been recognized in matters of public health and safety,**
 11 **including the regulation of food and drugs.”** Ackerman v. Coca-Cola Co., No. CV-
 12 09-0395 (JG) (RML), 2010 U.S. Dist. LEXIS 73156, at *20 (E.D.N.Y. July 21, 2010).

17 **B. State Law Claims for Breach of Warranty are Not Subject to Federal**
 18 **Preemption**

19 Federal preemption, where applicable, applies to requirements imposed by state
 20 statutes or regulations. State law breach of warranty claims of the type pleaded in the
 21 FAC are deemed not to be requirements **“imposed under state law”** because they
 22 arise – not from state statutes or regulations – but from a contract between the buyer
 23 and seller. Thus, courts have frequently held that breach of warranty claims are
 24 outside the scope of any potential federal preemption. See Cipollone v. Liggett Grp.,

1 505 U.S. 504, 525, 112 S. Ct. 2608, 2622 (1992), holding that federal preemption did
 2 not bar state law breach of warranty claims because:

3
 4 **“A manufacturer’s liability for breach of an express warranty derives from, and**
 5 **is measured by, the terms of that warranty. Accordingly, the ‘requirements’**
 6 **imposed by an express warranty claim are not ‘imposed under State law,’ but**
 7 **rather imposed by the warrantor.”** (emphasis added)

8 See also Ackerman v. Coca-Cola Co., No. CV-09-0395 (JG), 2010 U.S. Dist. LEXIS
 9 73156 at *23 (E.D.N.Y. July 21, 2010):

10 **“Further, breach of warranty claims are generally not preempted because they**
 11 **are not requirements ‘imposed under State law,’ but rather imposed by the**
 12 **warrantor.”**

13 **C. The FDCA Does Not Preempt Any of Plaintiffs’ Claims Because the**
 14 **State Law Claims Relating to the Product’s Nutrition Label are Based**
 15 **on the Violation of Federal Labeling Requirements**

16 The FDCA only expressly preempts state laws which are “not identical to”
 17 federal requirements. 21 U.S.C. § 343-1(a)(1)-(5). In other words, “**claims under**
 18 **state laws that parallel the FDCA’s requirements are not preempted.”** Ackerman
 19 v. Coca-Cola Co., No. CV-09-0395 (JG) (RML), 2010 U.S. Dist. LEXIS 73156, at
 20 *22 (E.D.N.Y. July 21, 2010). As the FDA itself has noted, federal law does not
 21 preempt state law claims which merely duplicate federal law requirements or which
 22 rely on the violation of federal standards. See e.g. Final Rule, Beverages: Bottled
 23 Water, 60 Fed. Reg. 57076, 57120 (Nov. 13, 1995):

24
 25 **“[I]f the State requirement does the same thing that the Federal law does, even**
 26 **if the words are not exactly the same, then it is effectively the same requirement**
 27 **as the Federal requirement . . . the only State requirements that are subject to**
 28 **preemption are those that are affirmatively different from the Federal**
requirements on matters that are covered by section 403A(a) of the act.”
 (emphasis added)

Where – as here – a state law consumer claim is based on the allegation that federal labeling requirements have been violated, there is no federal preemption of state law claims. See Pom Wonderful LLC v. Ocean Spray Cranberries, Inc., 642 F. Supp. 2d 1112, 1122 (C.D. Cal. 2009)(Judge Pregerson) (“As long as Plaintiff’s state claims do not impose different requirements than the FFDCA or FDA regulations, these claims are not preempted.”); Pom Wonderful LLC v. Welch Food, Inc., No. CV 09-567 AHM, 2009 U.S. Dist. LEXIS 133141, at *14 (C.D. Cal. June 23, 2009) (“denying claims of preemption arising out of the labeling provisions of the FDCA” and finding “that the state-based claims that Pom seeks to pursue here are not preempted” because they do not conflict with federal labeling standards); In re Pepsico, Inc., 588 F. Supp. 2d 527, 532 (S.D.N.Y. 2008) (holding as to FDCA preemption “state law causes of action are not preempted where they merely provide a damages remedy for claims premised on a violation of federal law that does not itself provide a private right of action.”); Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274, 280 (S.D.N.Y. 2014) (“State laws that impose affirmatively different labeling requirements from federal law in these areas will be preempted. Contrariwise, state laws that seek to impose labeling requirements identical to those required by federal regulations will not be preempted.”); Reynolds v. Whole Foods Stores, Inc., 2015 U.S. Dist. LEXIS 53405, *23 (N.D. Fla. Apr. 23, 2015) (“By its plain language the NLEA does not preempt state requirements that are identical to federal requirements in the applicable

1 sections of the FDCA and its implementing regulations.”) These principles control
2 the preemption question in the case at bar. The FDCA prohibits the misbranding of
3 any food product. 21 U.S.C. § 331(b) (“**The following acts and the causing thereof**
4 **are hereby prohibited:...(b) The adulteration or misbranding of any food, drug,**
5 **device, tobacco product, or cosmetic in interstate commerce.” (emphasis added).**
6

7 A food product is deemed misbranded under the FDCA if, inter alia, its labeling is
8 false or misleading in any particular. 21 U.S.C. §343(a) (“**A food shall be deemed to**
9 **be misbranded – (a) False or misleading label. If (1) its labeling is false or**
10 **misleading in any particular...**”) The basis of every state law claim pleaded in
11 Plaintiffs’ complaint relating to the nutrition label on Defendants’ Product is that
12 Defendants violated the federal labeling standards articulated in 21 U.S.C. § 331(b)
13 and §343(a) by falsely stating on the nutrition label that the Product contains “pork”
14 when, in fact, it does not contain any pork. See FAC, at Paragraphs 56 and 57.
15 Plaintiffs’ state law claims do not seek to impose any additional requirements on the
16 accuracy of Defendants’ label beyond what is already required under federal law.
17 Thus, Plaintiffs’ state law claims relating to the accuracy of Defendants’ nutrition
18 label are not in any way preempted. See e.g., Chavez v. Blue Sky Nat. Bev. Co., 268
19 F.R.D. 365 (N.D. Cal. 2010) (“**The express preemption provision of the FDCA**
20 **contained in section 343–1 therefore does not preempt the claims arising from**
21 **false or misleading labels regulated by section 343(a).**”).
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1 **Conclusion**

2 For the foregoing reasons, Defendants' motion under Fed.R.Civ.P. 12(b)(6)
3 should be denied in its entirety. Alternatively, if the Court believes that any part of
4 the complaint should be pleaded with greater specificity, Plaintiffs should be given an
5 opportunity to file an amended pleading containing any additional details the Court
6 feels are lacking.
7
8

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